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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Appellant, v. JASON DOUGLAS ROWE, Defendant and Respondent.	C085609 (Super. Ct. No. P17CRF0200)

Video surveillance captured Jason Douglas Rowe walking around a grocery store while rubbing his penis through his sweatpants. The form of his erect penis could be seen under his sweatpants. An information charged defendant with burglary with intent to commit indecent exposure and indecent exposure with three prior convictions, but the trial court granted defendant's motion to dismiss the charges, concluding that while the evidence would support a charge of lewd conduct if the People chose to amend, the evidence did not support a charge of indecent exposure.

The People chose to appeal rather than amend the information, arguing that although case law may require exposure of bare genitals to commit an act of indecent

exposure, the Legislature clearly intended to proscribe, in the indecent exposure statute, the type of act defendant committed here.

We conclude the trial court properly granted the motion to dismiss because the indecent exposure statute requires exposure of bare genitalia. Because there is no evidence defendant exposed his bare genitalia in this case, the evidence is insufficient to hold defendant to answer for indecent exposure. And because the burglary charge was based on the intent to commit indecent exposure, the trial court properly dismissed that charge as well. We will affirm the judgment.

BACKGROUND

Defendant went to a market in El Dorado Hills in May 2017, placed his personal items in a shopping basket, and walked around the store. Video surveillance captured defendant periodically grabbing or rubbing his penis through the outside of his pants. Defendant's bare penis was never seen on the video. Defendant left the store without purchasing anything.

The People charged defendant with attempted indecent exposure and burglary (Pen. Code, §§ 664, 314, subd. (1), 459, & 460, subd. (b)).[1] He denied the charges. At a preliminary hearing, the video surveillance was admitted into evidence and El Dorado County Sheriff's Deputy Andrew Gurrola testified to what he saw on the video. Deputy Gurrola conceded that defendant's bare penis was never visible on the surveillance video.

At the close of evidence, the prosecutor sought to hold defendant to answer for indecent exposure rather than attempted indecent exposure as had been charged, along with burglary. The trial court found sufficient evidence to support both charges and held defendant to answer. A subsequent information charged defendant with burglary with intent to commit indecent exposure (§§459/460, subd. (b) -- count one), and indecent

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[1] Undesignated statutory references are to the Penal Code.

exposure with three prior section 314.1 convictions (§ 314, subd. (1) -- count two). The information further alleged that defendant had served two prior prison terms. (§ 667.5, subd. (b).)

Defendant brought a section 995 motion to dismiss the information, arguing there was insufficient evidence to support the charges because he never removed his penis from his pants. The People opposed the motion, arguing that defendant intended to exhibit or display his genitals through his sweatpants. The trial court ruled the evidence presented at the preliminary hearing did not support the charges and dismissed them. The trial court noted that the evidence would support a charge of lewd conduct under section 647, subdivision (a) should the prosecutor choose to amend. Rather than amend the information, the People appealed.

STANDARD OF REVIEW

An information shall be set aside if the defendant has been committed without reasonable or probable cause. (§ 995, subd. (a)(2).) Probable cause to hold a defendant over for trial exists if a man of ordinary caution or prudence would believe and conscientiously entertain a strong suspicion of the guilt of the accused. (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.)

In considering a section 995 motion to dismiss, the superior court sits as a reviewing court, deferring to the magistrate as the finder of fact. (*People v. Jones* (1998) 17 Cal.4th 279, 301.) On appeal from an order granting a section 995 motion, the appellate court disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer. (*People v. Laiwa* (1983) 34 Cal.3d 711, 718, superseded by statute on another ground in *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223.) We may not substitute our judgment for that of the committing magistrate concerning the weight of the evidence or the credibility of the witnesses. (*People v. Block* (1971) 6 Cal.3d 239, 245.)

An information should not be set aside if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it; every legitimate inference must be drawn in the information's favor. (*Rideout v. Superior Court*, *supra*, 67 Cal.2d at p. 474.) On the other hand, an information must be set aside if there is a total absence of evidence to support a necessary element of the offense charged. (*Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1147-1148.)

DISCUSSION

The People contend that although case law may require exposure of bare genitals to commit an act of indecent exposure, the Legislature clearly intended to proscribe, in the indecent exposure statute, the type of act defendant committed here.

Section 314, subdivision (1) provides in pertinent part that a person who willfully and lewdly exposes his person or the private parts thereof in a public place, or in a place where there are other persons to be offended or annoyed, is guilty of a misdemeanor, or is guilty of a felony if convicted of this offense more than once. (§ 314, subd. (1).) Exposing his " 'person' " means an " 'entirely unclothed body, including by necessity the bare genitals . . . .' " (*People v. Carbajal* (2003) 114 Cal.App.4th 978, 982 (*Carbajal*), quoting *People v. Massicot* (2002) 97 Cal.App.4th 920, 924, 932 (*Massicot*).) It follows that exposing "the private parts thereof" means exposing bare genitals, not the clothed form or outline of genitals. Adopting the People's proffered interpretation of the statute could subject individuals in tight clothing to prosecution for indecent exposure, a result that would be untenable.

We agree with the People that case law indicates indecent exposure requires exposure of bare genitals. In *Carbajal*, *supra*, 114 Cal.App.4th 978, the Court of Appeal held there was sufficient circumstantial evidence of indecent exposure, i.e., that the defendant exposed his naked penis, because among other things the defendant deposited his semen on the floor beneath a restaurant table. (*Id*. at p. 987.) According to the court,

if his naked penis had not been exposed, his semen arguably would have been deposited in his clothes rather than on the floor. (*Ibid*.)

Likewise, in *Massicot, supra*, 97 Cal.App.4th 920, the defendant opened his robe at an inn to reveal he was wearing only women's lace underpants and a lace bra. (Id. at p. 922.) The underpants covered his penis, although the victim could see a bulge. (*Ibid*.) The court held that because the defendant did not display his bare genitals to the victim, his convictions for indecent exposure had to be reversed. (*Id*. at p. 932.)

The People nevertheless argue that the Legislature intended a different interpretation of the statute. But the argument fails because the People do not provide us with any evidence of legislative intent or legislative history to support their argument. They have not established reversible error.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
BLEASE, Acting P. J.

/S/
MURRAY, J.